Supreme Court, U.S.
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No. 93-1495

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, AND GRANT WOODS, ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

PETITIONERS,

-VS-

MITCHELL THOMAS BLAZAK,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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ARGUMENTS

I

THE STANDARD OF REVIEW SET FORTH IN *BAREFOOT v. ESTELLE*, 436 U.S. 880 (1983), APPLIES TO ALL FEDERAL HABEAS CORPUS REVIEWS OF STATE CONVICTIONS. THAT PETITIONER DID NOT ARGUE THIS RULE OF LAW IN THE NINTH CIRCUIT COURT OF APPEALS DOES NOT PRECLUDE ITS APPLICATION BY THIS COURT ON CERTIORARI.

Respondent contends in his brief that this Court cannot apply the habeas corpus standard of review to the instant case because Petitioner did not present that issue to the Ninth Circuit Court of Appeals. Instead, he urges this Court to continue to apply the less onerous standard established in 1966 in *Pate v. Robinson*, 383 U.S. 375, 385 (1966), and later employed in *Drope v. Missouri*, 420 U.S. 162, 180 (1975). His contention is meritless. Petitioner submits that recently evolved authority reflects that *Pate* is no longer the proper standard of collateral review. The correct standard of habeas corpus review is set forth in *Barefoot v. Estelle*, 436 U.S. 880, 887 (1985), and *Bruce v. Estelle*, 483 F.2d 1031, 1043 (5th Cir. 1975).

Petitioner did not press this argument in the Ninth Circuit because that circuit had firmly established *Pate* as the standard to decide habeas corpus cases involving state prisoners. *See Steinsvik v. Vinzant*, 640 F.2d 949, 952 (9th Cir. 1981). Although the 5th Circuit disagreed with that standard, it is not within the province of the Ninth Circuit to resolve disputes between circuits. Consequently, this issue is properly before this Court for certiorari review.

In *Brecht v. Abrahamson*, 507 U.S. ___, 113 S. Ct. 1710, 1719 (1993), this Court made it abundantly clear that "collateral review is different from direct review[.]" This announcement is but the latest in a line of cases that began with *Barefoot* in 1983, and which includes *Teague v. Lane*, 489 U.S. 288, 306 (1989), and *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Because of the doctrines of finality, comity and federalism, the burden on collateral review clearly rests on the state prisoner to demonstrate, by clear and convincing evidence, that his conviction was obtained in violation of the United States Constitution. *Brecht*, 113 S. Ct. at 1719. While the *Pate* standard of "evidence rais[ing] a bona fide

doubt as to the defendant's competence" may justify reversal on direct review, as it did in *Drope*, it is presently insufficient to satisfy the collateral review standard of "clear and convincing evidence" of a constitutional violation. "[I]t hardly bears repeating that 'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Brecht*, 113 S. Ct. at 1720. Thus, in *Brecht*, this Court rejected the "reasonable probability" standard of harmless error that applied on direct appeal in favor of the "substantial and injurious effect" standard to be applied henceforth on collateral review. *Brecht*, 113 S. Ct. at 1722. This Court should take the same position with respect to an allegation of evidence of incompetence.

The Fifth Circuit Court of Appeals recognized this direct/collateral review distinction in 1973, when it adopted a standard of review that is more consistent with recent habeas law established by this Court: when the issue of a state prisoner's mental competence is before the federal court on collateral review, the burden is on the prisoner to demonstrate a real and legitimate doubt as to his competence. *Bruce v. Estelle,* 483 F.2d 1031, 1043

(5th Cir. 1973). This standard is consistent with *Barefoot* and *Brecht*, and inconsistent with *Pate*. Because the standard of review in *Pate* is inconsistent with evolving habeas corpus review standards, Petitioners urge this Court to modify *Pate* by applying the *Bruce* and *Barefoot* standards to the present facts. To permit the Ninth Circuit's opinion in this case to stand would create an unwarranted distinction between the two standards and the inevitable conflict between the circuits with respect to the proper standard to apply on collateral review.

II

CERTIORARI IS APPROPRIATE IN THE INSTANT CASE BECAUSE, UNDER ANY STANDARD OF REVIEW, THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE DISTRICT COURT'S FINDING OF A DUE PROCESS VIOLATION.

For the reasons set forth in the petition, Petitioner submits that there is insufficient evidence to sustain the district court's finding of a due process violation, regardless of the standard applied by this Court. (Petition, at 10–20.)

CONCLUSION

The Ninth Circuit applied a direct-review standard to the facts of this habeas case rather than the collateral review standard set forth in *Barefoot* and *Bruce*. Consequently, it arrived at an incorrect conclusion. That conclusion is unfounded as well, with respect to application of the facts to the direct-review standard. Respondents urge this Court to modify the standard set forth in *Pate* by adopting the more recent collateral-review standard set forth in *Barefoot*, and *Bruce*, therefore reversing the evenly-divided circuit court opinion.

Respectfully submitted,

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